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Supreme Court of the United States

OCTOBER TERM, 1962

No. 335

SWARCO, INC. (Swan Rubber Company, Division of Amerace Corporation),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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NOTE: Record references are to separately printed Joint Appendix. Italics supplied unless otherwise noted.

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v.

NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Opinions Below

The opinion of the Court of Appeals, printed at the end of this Petition, is reported in F. 2d . It affirmed the Decision And Order of the Board (2a-12a) which is reported in 133 N.L.R.B., No. 31. The Board reversed the Trial Examiner who had recommended dismissal of the complaint against the Employer. Said Trial Examiner's Intermediate Report (13a-43a) is not reported.

The Board noted (6a) that it reversed the Trial Examiner "for the reasons stated in [its Decision in] *Erie*." That Decision and Order (*Erie Resistor Corporation*, 66a-92a), reported in 132 N.L.R.B., No. 51, was set aside by

the Court of Appeals for the 3rd Circuit; its Opinion expressly rejecting the Board's reasons is also printed at the end of this Petition and is reported in F. 2d : N.L.R.B. seeks certiorari (Docket No. 288).

Jurisdiction

The decree of the Court of Appeals, sought to be reviewed, is dated and was entered May 23, 1962.

The jurisdiction of this Court is invoked under 28 USC § 1254, made applicable by 29 USC § 160(e) (Sec. 10(e) of the National Labor Relatons Act—Labor Management Relations Act, 1947).

Question Presented for Review

Where the Trial Examiner found as facts (42a-43a): (1) that the "sole motivation" behind the Employer's offering and granting limited seniority preference indiscriminately to all employees returning to work during an economic strike was the "legitimate economic reason" of keeping its plants in operation during that strike, and (2) that the Employer had "no . . . desire to 'punish' its striking employees" who stayed out; and where the Board and the Court of Appeals did not reverse these findings or make contrary findings of fact, was it not error of law for the Board and Court to hold, nevertheless, that the foregoing conduct *per se* violated Section 8(a)(1) and (3) of the National Labor Relations Act (as amended by the Labor Management Relations Act of 1947)?

Statute Involved

Sections 7 and 8 of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (29 USC §§ 157, 158) provide in pertinent part as

follows:

"Sec. 7. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .

"Sec. 8. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

Statement of Case—Material Facts

This case involves the power of the Board to outlaw, as *per se* a violation of Sec. 8(a)(1) and (3), an Employer's means of operating its plant during an economic strike, without any actual purpose or motive of penalizing the strikers or discouraging unionism. The Supreme Court has struck down the Board's *per se* theory of violation of Sec. 8(a)(1) and (3) in *Local 357 Teamsters* v. *N.L.R.B.*, 365 U. S. 667 (cf. *N.L.R.B.* v. *Insurance Agents' Intl. Union*, 361 U. S. 477) and has upheld the legality of the employer's self-help to keep a plant in operation during an economic strike, in *N.L.R.B.* v. *Mackay Co.*,

304 U. S. 333, 345-6. The legality of the particular means used here to operate a plant during an economic strike—limited seniority preference indiscriminately applied to all returning employees—has been upheld by the Courts of Appeals in the Third and Ninth Circuits; *Erie Resistor Corp.* v. *N.L.R.B.*, F. 2d (C. A. 3, reprinted at end hereof); *N.L.R.B.* v. *Potlatch Forests, Inc.*, 189 F. 2d 82 (C. A. 9). The conflict between the decision below and these decisions is the express basis for the Government's pending petition for certiorari in *Erie* (Docket No. 288).

Upon amended charges and complaints and after a hearing, the Trial Examiner issued his Intermediate Report finding that the Employer had not intended by its offer and grant of such limited superseniority to coerce the employees or discriminate against them and had not engaged thereby in any unfair labor practice. The Board reversed, on the ground that "super-seniority *however motivated* was an illegal discrimination against strikers" (73a, 6a); it ordered the Employer, in the usual form, to rescind its super-seniority policy and to reinstate with back pay adversely affected employees (9a-10a).

The Court of Appeals, upon the Employer's petition to review and the Board's answer requesting enforcement, decreed enforcement of the Board's Order. The Board's and Court's jurisdiction rested on Section 10(c), (e), and (f) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (29 USC § 160(c), (e) and (f)).

The essential facts were stipulated by the parties (3a, 18a-31a). The following summary is taken from the opinion of the Court below.

The Employer operated two plants, one in Bucyrus, Ohio, and one in Carey, Ohio. Local 267 of the Rubber Workers Union had represented the employees at Bucyrus since 1957. The employees at Carey had been represented

by Local 414 of the Rubber Workers Union since 1950. There were separate bargaining units for the two plants whose contracts expired about May 1, 1960. Negotiations which had begun in March broke down over issues of union shop, checkoff and arbitration. On Sunday, May 8, 1960, the two locals struck their respective plants; the strike was not caused or prolonged by any unfair labor practice.

The Employer at Bucyrus was the exclusive producer of special hose products for automotive manufacturers and other companies. It being in the height of the season, the Employer was concerned over the possibility of losing these customers to whom prompt delivery was essential. It, therefore, decided to open the Bucyrus plant immediately. Accordingly, the plant was opened on May 9th and on the first day of opening a substantial number of employees crossed the picket line and went to work. The reporting employees were told that they could have any available job for which they were competent and that they would be protected against "bumping" or future layoffs, regardless of previous seniority, as against striking employees who did not return to work before the end of the strike. This preferred seniority was to be applicable to these employees only so long as they remained on the jobs which they chose at the time. The non-striking employees were told to inform the strikers of the employer's promise of superseniority, if they returned to work. Supervisors of the petitioner visited the picket line, in person, and informed the strikers of the offer of superseniority and job transfer.

Additional employees abandoned the strike and returned to work at the Bucyrus plant within the next four days. No new replacements were hired and Local 267 called off the strike a week after it began. Subsequently, in the course of economic layoffs, approximately nineteen of the former strikers were laid off solely because of their re-

duced seniority under the plan adopted by the Employer during the strike. These laid-off employees are the subject of the Board order under review.

At the time of the strike, the Carey plant had built up a substantial surplus of manufactured products and the Employer made no effort to operate that plant until June 2, 1960. On that date it sent a letter to the Carey employees and offered to them the same superseniority and choice of jobs that was offered to the employees at the Bucyrus plant. This offer was repeated in another letter dated July 8th.

Approximately seventy-five employees returned to work. In addition one hundred seven new employees were hired during the strike. The superseniority offer did not apply to the new replacements. In subsequent negotiations Carey, Local 414, agreed to accept the superseniority policy until June 1, 1961, if the returned strikers who were the beneficiaries of this policy would agree to go back to their old jobs. The returned strikers rejected this by secret ballot on July 16th. The strike was called off on July 23rd. One employee at Carey was laid off on September 19, 1960, solely as a result of his reduced seniority under the Employer's plan. Subsequent to the end of the strike, the union at Bucyrus was decertified by a vote of the employees. In August, 1960, a decertification petition was filed, by certain employees, at the Carey plant.

(The same International Union now, again, represents both plants in collective bargaining with the Employer.)

REASONS FOR ALLOWING WRIT

The Decision of the Court of Appeals (and of the Board) Conflicts With Applicable Decisions of the Supreme Court, and of the Courts of Appeals for the Third, Ninth, Seventh, and Fourth Circuits, on an Important Recurrent Question of Federal Law.

1. This Court has consistently held that, where an employer is charged with an unfair labor practice within Sec. 8(a)(1) and (3) by "discrimination" in employment "to encourage or discourage" union membership, "[i]t is the *'true purpose' or 'real motive' in hiring or firing that constitutes the test.*" *Local 357, Teamsters* v. *N.L.R.B.*, 365 U. S. 667, 675 (reversing the Board's decision that a hiring hall provision was "unlawful per se" under the Act); *Radio Officers* v. *N.L.R.B.*, 347 U. S. 17, 42-44; *N.L.R.B.* v. *Mackay Co.*, 304 U. S. 333; *N.L.R.B.* v. *Jones & Laughlin*, 301 U. S. 1.

"A mere showing of foreseeable [dis]couragement of union status is not a sufficient basis for a finding of violation of the statute." *Local 357, Teamsters, supra*, at 679 (concurring opinion). The employer's real motive—was the employer "motivated by a desire to encourage or discourage union membership or other activities"?—was held by this Court "to be decisive" in *Radio Officers, supra*, at 43-4, the Court citing *Jones & Laughlin, supra*, and a companion case, and referring also to the rule "uniformly applied" by the Courts of Appeals, the emphasis of text writers, a then recent Board report and the "clear" intent of Congress. "The plain and long accepted meaning of § 8(a)(3) is that it forbids an employer to discriminate only when he does so *in order to* 'encourage or discourage' union membership." (*Radio Officers*, at 57-8, dissent. op. Italics in original.) In accordance with that principle, the Court held that it was not "an unfair labor practice to replace the striking employees with others in an effort

to carry on the business" offering the replacements "permanent" jobs. *Mackay, supra*, at 345, 346.

The Court below, affirming the Board, held that an employer's "*honest motive . . . is not enough*" where the "natural consequence of his action was such encouragement or discouragement" of union membership (*infra*, 23). Thus they failed or refused to abide by the decisive test of actual motive to discourage union membership, laid down by the Supreme Court in the cases cited and quoted above.

Of those cases, the Court below referred only to *Mackay* and *Radio Officers*. It distinguished *Mackay* on "the facts" and quoted from *Radio Officers, supra*, at 45, the following language:

> "Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing when a natural consequence of his action was such encouragement or discouragement."

The Court below, however, failed to note that its interpretation of *Radio Officers*, including the quoted language, was authoritatively ruled out by the Supreme Court in *Local 357, supra*, at 675, wherein this Court interpreted *Radio Officers* including the quoted language as follows:

> "It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test. [*Radio Officers*] Id. 347 US 43. Some conduct may by its very nature contain the *implications* of the *required intent:* the natural foreseeable consequences of certain action *may warrant the inference*. Id. 347 U. S. 45."

It is evident from this Court's opinions and holdings in *Radio Officers* and *Local 357* and its other decisions, *supra*, that although the natural consequence of union discouragement may in an appropriate case be evidence, supporting an inference of unlawful motive, that inference is rebuttable. By itself such inferential evidence is not sufficient to

show a violation *where, as in our case, the factual evidence and unreversed findings negate any unlawful motive.*

The nub of Employer Gaynor's violation (in *Radio Officers, supra*) was its purpose or motive to connive in the union's breach of its statutory duty faithfully to represent all employees in the unit, whether or not union members (see concurring opinion in *Local 357, supra*, at 681). In our case the Employer's sole motive was found to be the legitimate, important business reason of keeping its plants in operation during a strike not caused or prolonged by any unfair labor practice on its part.

2. "Although the Act protects the right of the employees to strike in support of their demands, *this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide.*" *N.L.R.B. v. Truck Drivers Union*, 353 U. S. 87, 96 (holding lawful a temporary lock-out to preserve the multi-employer bargaining unit).

That the Employer has the right to keep his plant in operation during an economic strike is now beyond question, *Mackay, supra*, 304 U. S., at 345-6. As the Board's brief conceded in the Court below, *Mackay*, in thus permitting the replacement of economic strikers, "does affect the employees' right to strike" (p. 21); "*Mackay* itself thus represents a limitation on the right to strike, and in effect permits 'discrimination' against strikers to some extent" (p. 22, n.). The natural foreseeable consequence of replacing an economic striker is to discourage union membership; the 'foreseeable consequence' test adopted below, for employer action to keep his plant open during an economic strike, is therefore clearly incompatible with the *Mackay* doctrine.

The plan adopted by the Employer in the case at bar was not based on union or concerted activity and was not a coercive inducement to the striker to return, any more

than was the replacement and threatened replacement of strikers which *Mackay* sanctioned; it was, indeed, far less drastic than the means approved in *Mackay;* only stepped-down seniority resulted, rather than complete job loss; and even this lesser consequence affected the smallest number of strikers possible consistent with keeping the plants open, rather than all or the bulk of strikers, who could be replaced under the *Mackay* doctrine. More so than in *Mackay* or even *Potlatch* and *Erie Resistor*, the instant Employer's action was reasonably necessary and appropriately limited to the accomplishment of its permissible objective of keeping its plants in operation. The Employer, in pursuing that right, must, appeal to the only practicably available source of supply for skilled help for a large plant in a small town; namely, the striking group. The Employer's right to operate is illusory if by such appeal he is held to be engaged in an unfair labor practice, even though his sole purpose is to exercise that undoubted right and he has no purpose to penalize the strikers.

This is an instance of self-help pursuant to a legitimate interest, *without any unlawful motive*, and therefore "plainly without" (*Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U. S. 177, 194) the condemnatory language of the Act. As this Court held in *N.L.R.B.* v. *Insurance Agents' Intl. Union*, 361 U. S. 477, 498:

> "It is one thing to say that the Board has been afforded flexibility to determine, for example, whether an employer's *disciplinary* action taken against specific workers is permissible or not, or whether a party's conduct at the bargaining table evidences a real desire to come into agreement. The statute in such areas clearly poses the problem to the Board for its solution. Cf. *N.L.R.B.* v. *Truck Drivers Local No. 449, I.B.T.C.W. & H.*, 353 U. S. 87. And specifically we do not mean to question in any way the Board's powers to determine the latter question, drawing inferences

> from the conduct of the parties as a whole. *It is quite another matter, however, to say that the Board has been afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful. . . .*"

In the case at bar, the Court of Appeals has permitted the Board to pick and choose an economic means to be branded as illegal, even though it was not adopted as a disciplinary measure at all and clearly was not "a stratagem or device to evade the policies of the Act", *Insurance Agents' Intl. Union, supra*, at 499. The Board has plainly exceeded its statutory authority "by the proscription of conduct *per se* and without regard to inferences as to state of mind to be drawn from the totality of the conduct in each case." *Insurance Agents' Intl. Union, supra*, at 513 (separate opinion).

3. The decisions of the Board and the Circuit Court below are also in conflict with *Erie Resistor Corp. v. N.L.R.B.*, F. 2d (C.A. 3, reprinted at end of this Petition), certiorari requested for N.L.R.B. because of said conflict: *N.L.R.B. v. Pollatch Forests, Inc.*, 189 F. 2d 82 (C.A. 9); *N.L.R.B. v. Calif. Date Growers Assn.*, 259 F. 2d 587 (C.A. 9); *N.L.R.B. v. Lewin-Mathes Co.*, 285 F. 2d 329 (C.A. 9); *N.L.R.B. v. Community Shops, Inc.*, 301 F. 2d 263 (C.A. 7); and *Olin Mathieson Chemical Corp. v. N.L.R.B.*, 232 F. 2d 158 (C.A. 4), affd. *per curiam* 352 U. S. 1020.

In the first two cited cases, the Court of Appeals for the Third and Ninth Circuits reversed the Board and held that super-seniority to strikers, to induce them to return to work during an economic strike, did not contravene Sec. 8(a)(1) and (3) of the Act. In each case, the Court held the absence of any unlawful motive to be dispositive of the issue: e.g.

> *Erie Resistor*: "We reject as unsupportable the rationale of the Board that a preferential seniority

policy is illegal however motivated. We are of the opinion that inherent in the right of an employer to replace strikers during a strike is the concomitant right to adopt a preferential seniority policy which will assure the replacements some form of tenure, provided the policy is adopted SOLELY to protect and continue the business of the employer. We find nothing in the Act which proscribes such a policy." (*infra*, 32-3)

Potlatch Forests: ". . . Failure of an employer to maintain previous seniority rights for returning strikers may be said to discourage union membership, but many acts of an employer which seem to come within the language of Sec. 8(a)(3) are nevertheless permissible if they are done for a legitimate business purpose. . . ."

. . . . . .

"In the instant case, therefore, the 'discrimination' between replacements and strikers is not an unfair labor practice despite a tendency to discourage union activities, because the benefit conferred upon the replacements is a benefit reasonably appropriate for the employer to confer in attempting 'to protect and continue his business by supplying places left vacant by strikers.'" (at 85, 86).

In *Lewin-Mathes*, *supra* (at 333) the Seventh Circuit held "it lawful and proper to grant superseniority to replacements" for economic strikers. In *Community Shops*, *supra*, the same Circuit held a rehire formula legal, pointing out (at 266) that the Board, in finding the contrary, had "relied upon a 'foreseeability' test such as was rejected by [the Supreme Court in] *Local 357*", *supra*.

In *Olin Mathieson*, *supra*, the Court affirmed the Board's holding that super-seniority there was illegal because it had been first offered *after* the plant was in full operation, justifying the inference that the employer "was penalizing the strikers for exercising their right to strike" (at 161).

On like facts, *Colt Data Graphics, Assn.*, *supra*, also affirmed the Board's holding of violation, the Court stating (at 588): "The *motive* of the employer in entering into these actions becomes the controlling factor" (italics in original), citing *Ohio Matheson Foundry* and *Jones & Laughlin*, *supra*. The Court, in *Ohio Matheson*, distinguished a case such as ours by noting (at 161) that in the "Ohio plants" "No promises, when the workers employed, were made to the employees who remained at work during the strike, or who returned to work before the end of the strike, that their employment would be permanent."

Because the decisions below answer an important recurrent question of federal labor law and policy contrary to the applicable decisions of the Supreme Court and four Circuits, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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August, 1962.

APPENDIX I

Opinion of Court of Appeals

No. 14753

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SWARCO, INC. (Swan Rubber Company Division of Ameraco Corporation), *Petitioner*, v. NATIONAL LABOR RELATIONS BOARD, *Respondent*.	ON PETITION to Review and Set Aside, and on Request for Enforcement of, an Order of the National Labor Relations Board.

Decided May 23, 1962.

Before: CECIL and WEICK, Circuit Judges, and STARR, Senior District Judge.

CECIL, Circuit Judge. This case is before the Court upon the petition of Swarco, Inc., to review and set aside an order of the National Labor Relations Board issued against it on September 26, 1961. The National Labor Relations Board hereinafter called the Board, Respondent, filed an answer in which it requested enforcement of its order. (133 N.L.R.B. No. 31.)

The matter was submitted to the Trial Examiner upon a stipulation of facts and the oral testimony of four witnesses. The facts may be briefly summarized as follows:

The petitioning employer at the time this cause of action arose operated two plants, one in Bucyrus, Ohio, and one in Carey, Ohio. Local 267 of the Rubber Workers Union had

represented the employers at Bucyrus since 1957. The employees at Carey had been represented by Local 414 of the Rubber Workers Union since 1950. There were separate bargaining units for the two plants whose contracts expired about May 1, 1960. Negotiations which had begun in March broke down over issues of union shop, checkoff and arbitration. On Sunday, May 8, 1960, the two locals struck their respective plants.

The petitioner at Bucyrus was the exclusive producer of special hose products for an automotive manufacturer and other companies and it being in the height of the season, the employer was concerned over the possibility of losing these accounts. The petitioner decided to open the Bucyrus plant immediately. Accordingly, the plant was opened on May 9th and on the first day of opening a substantial number of employees crossed the picket line and went to work. The reporting employees were told that they could have any available job for which they were competent and that they would be protected against bumping or future layoffs, regardless of previous seniority, as against striking employees who did not return to work before the end of the strike. This preferred seniority was to be applicable to these employees only so long as they remained on the jobs which they chose at the time. The non-striking employees were told to inform the strikers of the employer's promise of superseniority, if they returned to work. Supervisors of the petitioner visited the picket line, in person, and informed the strikers of the offer of superseniority and job transfer.

Additional employees abandoned the strike and returned to work at the Bucyrus plant within the next four days. No new replacements were hired and Local 267 called off the strike a week after it began. Subsequently, in the course of economic layoffs, approximately nineteen of the former strikers were laid off solely because of their reduced seniority under the plan adopted by the employer during

the strike. These laid-off employees are the subject of the Board order now before us.

At the time of the strike, the Carey plant had built up a substantial surplus of manufactured products and the employer made no effort to operate that plant until June 2, 1960. On that date the petitioner sent a letter to the Carey employees and offered to them the same superseniority and choice of jobs that was offered to the employees at the Bucyrus plant. This offer was repeated in another letter dated July 8th.

Approximately seventy-five employees returned to work. In addition one hundred seven new employees were hired during the strike. The superseniority offer did not apply to the new replacements. In subsequent negotiations Carey, Local 414, agreed to accept the superseniority policy until June 1, 1961, if the returned strikers who were the beneficiaries of this policy would agree to go back to their old jobs. The returned strikers rejected this by secret ballot on July 16th. The strike was called off on July 23rd. One employee at Carey was laid off on September 19, 1960, solely as a result of his reduced seniority under the respondent's plan. Subsequent to the end of the strike, the union at Bucyrus was decertified by a vote of the employees. In August, 1960, a decertification petition was filed, by certain employees, on the Carey plant. This matter is still pending.

The amended complaint charged that the petitioner violated sections 8(a)(1) and (3) of the National Labor Relations Act (Section 158(a)(1)(3), Title 29 U.S.C.) by offering and granting superseniority to the strikers at its two plants, if they abandoned the strike and returned to work.

The Trial Examiner, in his intermediate report, recommended that the complaints be dismissed. He found that the strike was an economic one and that the employer was motivated by a sincere desire to keep its plants in opera-

tion and not to punish the strikers and that its conduct was based on legitimate economic reasons and, therefore, not violative of the Labor Act. In support of this conclusion he relied on *N.L.R.B.* v. *Potlatch Forests, Inc.*, 189 F. 2d 82, C. A. 9.

The general counsel filed exceptions to the intermediate report and the case was reviewed by the Board. The Board reversed the Trial Examiner and found that the petitioner violated sections 8(a)(1) and (3) of the Act by offering and granting superseniority to strikers at its Bucyrus and Carey plants. The Board further found that the petitioner violated these sections by laying off a number of recalled strikers solely as a result of their reduced seniority under the superseniority plan. The Board relied on *Erie Resistor Corporation*, 132 N.L.R.B. No. 51, in support of its conclusion. This case is now pending on appeal in the Third Circuit.

It is conceded that under the doctrine of *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345, the employer could have hired new employees as replacements of its regular employees, in order to keep its plant in operation and that it would not have to discharge these replacements after the strike, in order to put the strikers back to work. It is argued on behalf of the employer that if new employees could be hired, as replacements, there is no reason why its own employees could not be put to work as replacements for the strikers.

In reversing the Trial Examiner, the Board did not find that he erred in his findings of fact that the employer did not act to punish the strikers or that it was motivated by a sincere desire to keep its plant in operation in the face of an economic strike. The Board based its reversal on the Erie Resistor case, supra. In that case, the Board held that the granting of superseniority to strikers and strike replacements, in order to induce them to abandon a strike and return to work, was a form of discrimination beyond

the purview of an employer's right to replace economic strikers as sanctioned by the Mackay Radio case.

The facts of this case do not bring it within the ambit of the *Mackay* case. The question posed here is whether, under the facts of this case, the granting of superseniority is a violation of sections 8(a)(1) and (3) of the Labor Act. (Section 158(a)(1)(3), Title 29 U.S.C.)

We do not consider that *N.L.R.B.* v. *Potlatch Forests, Inc.*, 189 F. 2d 82, C. A. 9, is dispositive of the case at bar. In *Potlatch*, the union and the employer disagreed over wage differentials in renewing their contract and the union called a strike in August 1947. Near the end of August, the employer was able to resume operations by gradually accumulating both new employees and old employees who crossed the picket line. When the strike was later terminated, the replacements numbered about 1750 out of a normal complement in the bargaining unit of 2600.

The strike being hopelessly lost, the union began negotiations to settle it on October 10, 1947. In the course of these negotiations, the employer vigorously contended for protection of job security of the replacements as against those who would return upon the termination of the strike. The union as vigorously maintained that the seniority rights of the strikers should be preserved. The strike was settled on October 13th and immediately the employer drafted, in writing, the strike seniority policy which gave rise to the action of the Board. The essence of this policy was that the employees who came to work after October 13th were to be laid off ahead of those replacements who were working before that date, in the event a reduction in force should become necessary.

Potlatch maintained this seniority policy without deviation and on February 18, 1949, the International Woodworkers of America, Local 10-364, filed charges against the employer of violation of section 8(a)(1) and (3) of the

Act. The Board found a violation of this section 8(a)(3), on the basis that it provides, "that 'it' shall be an unfair labor practice for an employer * * * by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *" (p. 84).

The court for the Ninth Circuit considered that the sole question for determination was whether the acts charged constituted discrimination under section 8(a)(3) of the Act. A simple "economic strike" being involved, an unfair labor practice could not be sustained unless it was found that the maintenance of the seniority policy was in and of itself an unfair labor practice (p. 85).

The court found that there was *no discrimination* between union and non-union members on the basis of union membership. The only discrimination charged was between the replacements, some of whom were strikers returned to work before the strike ended, and the strikers who returned to work after the termination of the strike.

The court held "In the instant case, therefore, the 'discrimination' between replacements and strikers is not an unfair labor practice despite a tendency to discourage union activities, because the benefit conferred upon the replacements is a benefit reasonably appropriate for the employer to confer in attempting 'to protect and continue his business by supplying places left vacant by strikers.' Hence, we think the specific question posed here has been answered by the Supreme Court by recognizing that an employer attempting to fill a number of positions must be able to offer a substantial degree of security (as well as attractive wages), and that an employer may properly assure the replacements that 'their places might be permanent.' If there are not enough jobs to go around at the time the strike is settled the rights of replacements prevail over strikers." p. 86.

The record does not disclose that the employer promised or assured the replacements that their jobs would be permanent at the time they were employed. Neither is it shown that the employer promised seniority to the employees in order to get them to return to work and abandon the strike.

In *Olin Mathieson Chemical Corporation* v. *N.L.R.B.*, 232 F. 2d 158, C. A. 4, affirmed 352 U. S. 1020, the Board found in agreement with the Trial Examiner that the employer changed its seniority policy after the strike so as to give preference to employees who had worked during the strike in order to discipline employees adhering to the strike until the very end. The court found on the facts that the employer "was clearly penalizing the strikers for exercising their right to strike and was thereby clearly discouraging any exercise of this right in the future." p. 161. The Board's order was enforced.

In *N.L.R.B.* v. *California Date Growers Association*, 259 F. 2d 587, C. A. 9, the court held that there was substantial evidence in the record as a whole to support the Board's finding that the employer "revised its seniority list, * * * not to implement its assurances to the non-strikers but rather for the purpose of punishing employees who struck against it, and to discourage by this means further activity by those strikers or other employees in behalf of the Union." See also *Ballas Egg Products, Inc.* v. *N.L.R.B.*, 283 F. 2d 871, C. A. 6.

N.L.R.B. v. *Lewin-Mathis Co.*, 285 F. 2d 329, C. A. 7, is another case involving superseniority granted to replacements as against strikers in an economic strike. *In this case, the replacements were taken from a non-striking unit of the employer's plant.* At their request, they were granted superseniority against returning strikers, as a condition to accepting the employment. The court found that the strikers were economic strikers and that in such case it

was lawful to grant superseniority to replacements. This is in accord with the rule announced in *N.L.R.B.* v. *Mackay Radio and Telegraph Co.*, 304 U. S. 333, at 345, 346.

From a review of these cases involving superseniority, we find that the question of violation of section 8(a)(1) and (3) of the Act, by reason of granting such superseniority, is a question of fact. Each case must be decided on its own particular facts.

Section 8(a)(3) of the Act, so far as it is pertinent to this case, provides, in part, "It shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." If this section is violated, it follows, that (a)(1) is also violated. This section makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 (157, Title 29 U.S.C.) of this title." Section 7 gives employees the right "to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection."

In the case of an economic strike there is no restraint on the employer communicating with the employees. This is protected by the first Amendment to the Constitution. *N.L.R.B.* v. *Virginia Electric and Power Co.*, 314 U. S. 469; *N.L.R.B.* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 153, C. A. 7.

In the Bradley case, the court said: "The mandate of the statute is that the employer shall not interfere with or coerce the employees in the exercise of their right to organize and bargain collectively. However, *absent a showing of interference or coercion, or a threat of reprisal or promise of benefit*, in such situations, the employer is free to say to his employees that he wishes to carry on production and, that, if the employees desire so to do, they may return to work.

Appendix I

"* * * In situations such as the one before us, we think the employer may communicate directly to his striking employees the working conditions he is willing to extend to them; and that, if in the exercise of free choice, the employees return to work, no charge of misconduct may properly be levied against him. *If the communications are fair in their descriptions of the situation and they do not offer the returning employees greater benefits than will be extended to those remaining on strike, they do not support a finding of unfair labor practices.*" (Emphasis added.) See also *N.L.R.B.* v. *Wooster Division of Borg-Warner Corporation*, 236 F. 2d 898, 905, C. A. 6, affirmed in part and reversed in part, 356 U. S. 342.

In the case at bar, the employer offered the first employees at Bucyrus who voluntarily crossed the picket line superseniority over the employees who remained on strike. It instructed them to carry this word and offer to other employees and it sent supervisors out on the picket line to offer the same inducement to the strikers.

The employer made the same offer to employees at Carey, when it was ready to open that plant. It did this by letter on two separate occasions.

The granting of superseniority to employees who gave up the strike and returned to work was a benefit to them which was not granted to those who remained on strike. It constituted an inducement to give up the strike and a threat of reprisal to those who continued on strike. It was not an easy choice to make—an immediate benefit as against a possible future benefit, if the strike succeeded. To a factory worker, seniority against being laid off, when a reduction in force is necessary, is a very valuable right. The importance of seniority as a tool in the hands of the employer is discussed in the *Erie Resistor* case, *supra*.

Although it is conceded that an employer has a right to keep his plant in operation during an economic strike, an

honest motive alone for that purpose is not enough. In *Radio Officers' Union of Commercial Telegraphers Union* v. *N.L.R.B.*, 347 U. S. 17, 45, the court said: "Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement."

We conclude that, under the facts of this case, the conduct of the petitioner in urging the strikers to come back to work on the promise of granting those who abandoned the strike and returned to work seniority over those who remained on strike constituted discrimination which did, in fact, discourage membership in the union. Such discrimination interfered with the employees' right to engage in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

Consequently, we find that the petitioner violated sections 8(a)(1) and (3) of the Act and an order of enforcement is decreed.

APPENDIX II

Opinion of Court of Appeals

J-3147
Int'l Union of Elec. & Machine, Local 613
(Erie Resistor Corporation)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,695

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 613, AFL-CIO,
Petitioner,

v.

*NATIONAL LABOR RELATIONS BOARD,
Respondent

No. 13,700

ERIE RESISTOR CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON PETITIONS FOR REVIEW AND CROSS-PETITION TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued January 26, 1962
Before KALODNER, STALEY and SMITH, *Circuit Judges*

OPINION OF THE COURT
(Filed May 15, 1962)

*6-CA-1790; 132 NLRB No. 51.

Appendix II

By SMITH, *Circuit Judge.*

This case is before the Court upon petitions for review filed by the Erie Resistor Corp. (the Company), and Local 613, I.U.E., AFL-CIO (the Union), and a cross-petition filed by the National Labor Relations Board (the Board) for the enforcement of its final order. These petitions were filed under Sections 10(f) and (e) of the Labor Management Relations Act, 1947, 29 U.S.C.A. 160(f) and (e). The essential facts are not in dispute and the jurisdiction of this Court is conceded.

FACTS

The Company maintained a manufacturing plant at Erie, Pennsylvania, where it was engaged in the manufacture and sale of electronic components, electro-mechanical assemblies, and custom molded plastics. The production and maintenance workers of the Company were, and had been since 1951, represented by the Union. There had been in force and effect successive collective bargaining agreements, the last of which was terminated on March 31, 1959.

Approximately two months prior to the termination of the then existing agreement, the Union notified the Company of its desire to enter into negotiations in anticipation of a new contract. The negotiators for the respective parties met from time to time thereafter but were unable to reach full agreement. When the existing agreement terminated on March 31, 1959, a strike was called. It is here admitted that at its inception the strike was economic. When the strike was called there were 478 production and maintenance workers actively employed and 450 on layoff status; of those on layoff status, approximately 400 had no reasonable expectation of being recalled. All of the workers actively employed joined the strike.

The Company attempted to maintain production operations during the month of April by using clerical employees

and other personnel outside the bargaining unit. Production declined to a level between 15% and 30% of normal, and several customers cancelled their orders with the Company. On May 3, 1959, each of the strikers was notified by letter that the Company intended "to obtain replacements"; they were further notified that they would hold their positions only until replaced. The hiring of replacements commenced on May 11, and continued thereafter until June 24, 1959. The replacements included new employees, employees on layoff status, and returning strikers. When the applicants were accepted they were told that they would not be laid off or discharged by reason of the settlement of the strike.

When the negotiators met on May 11, 1959, the representatives of the Union were informed that replacements were being assured that they would not be discharged upon settlement of the strike. The Company, prompted by a desire to implement its assurances, proposed that the existing seniority system be so modified as to accord the replacements some form of preferential seniority. The Company offered to consider any plan acceptable to the Union, but the offer was rejected. The subject was discussed at five sessions held between May 11th and May 28th. The representatives of the Union remained adamant in their refusal to consider it on the ground that a preferential seniority system would be discriminatory and illegal.

On May 27, 1959, the Company formulated a preferential seniority plan under which twenty years were added to the regular length of service of all production and maintenance workers who accepted employment during the strike. The plan was limited in its application to future layoffs and recalls from layoff. The Union was informed of the plan on the following day and publicized it in radio and television broadcasts on May 30th and 31st. The strikers were informed by letter addressed to each of them by the Company on June 10th; copies of the plan were

posted on the company bulletin boards on June 15th. Notwithstanding the formulation of a preferential seniority policy, the Company expressed a willingness to consider any alternative plan proposed by the Union.

The strike ended on June 25, 1959, after the Union withdrew the picket line and offered to submit the seniority issue to the Board. Thereafter the strikers who had not been replaced were recalled by the Company in the order of seniority. By July 5th, 358 production and maintenance workers had returned to work; this number increased to 442 by September 20th. Thereafter, between September of 1959 and May of 1960, 202 employees were laid off for economic reasons; many of these were recalled strikers whose seniority was insufficient only because of the operation of the preferential seniority plan.

DECISION AND ORDER OF THE BOARD

The Trial Examiner concluded that under the applicable decisions a preferential seniority policy cannot be held illegal in the absence of proof that its adoption was prompted by a wrongful motive. He found that the evidence was "wholly inadequate" to support a factual determination that the adoption of the preferential seniority policy here in question was prompted by an illegal motive, and recommended dismissal of the complaint. The Board rejected the conclusion of the Trial Examiner and held "that superseniority HOWEVER MOTIVATED [is] an illegal discrimination against strikers."[1] (Emphasis by this Court).

The Board found: first, that the preferential seniority policy was inherently discriminatory and that its adoption

[1] This was admittedly the rationale of the Board in the Matter of POTLATCH FORESTS, INC., et al., 87 N.L.R.B. 1193 (1949). See Decision and Order of the Board, Joint Appendix 10a. This rationale was rejected, and enforcement of the Board's Order was denied by the Court of Appeals. N.L.R.B. v. POTLATCH FORESTS, 189 F.2d 82 (9th Cir. 1951).

was an unfair labor practice within the meaning of Sections 8(a)(3) and (1) of the Act, 28 U.S.C.A. 158(a)(3) and (1); second, that the layoff of recalled strikers was discriminatory and violated the said sections; third, that the Company's insistence upon a preferential seniority plan as a condition to settlement was tantamount to a refusal to bargain and an unfair labor practice within the meaning of Section 8(a)(5) of the Act, 28 U.S.C.A. 158(a)(5); and fourth, that the said conduct converted the strike into an unfair labor practice strike as of May 29, 1959, and, therefore, the refusal to reinstate all strikers upon termination of the strike was likewise a violation. The order directed the Company to cease and desist from the practices found to be illegal, and to take affirmative action consistent with the Board's decision.

DISCUSSION

We concede that the application of a preferential seniority policy may be discriminatory and may tend to discourage union membership. The narrow question before us for decision is whether such a policy HOWEVER MOTIVATED is illegal.

An employer in the ordinary management of his affairs may be required to make business decisions discriminatory in their probable consequences. Such discrimination is not in and of itself illegal. The discrimination proscribed by Section 8(a)(3) as an unfair labor practice is that which is motivated by a desire "to encourage or discourage membership in a labor organization."

The Supreme Court has consistently held that the discriminatory conduct of an employer is not unlawful in the absence of an illegal motive. TEAMSTERS LOCAL v. LABOR BOARD, 365 U.S. 667 (1961); RADIO OFFICERS v. LABOR BOARD, 347 U.S. 17 (1954); LABOR BOARD v. MACKAY CO., 304 U.S. 333 (1938); LABOR BOARD v. JONES & LAUGHLIN, 301 U.S. 1 (1937). The Court has adhered to the view that motivation

is a relevant factor and the test of the employer's conduct. Ibid.

The case of TEAMSTERS LOCAL v. LABOR BOARD, supra, is pertinent. The matter came before the Board on a complaint which charged that an exclusive hiring agreement between an employer and a union violated Sections 8(a)(3) and (1). The agreement was held illegal on the ground that it inherently and unlawfully encouraged union membership. The decision of the Board was sustained by the Court of Appeals. The decision of the Court of Appeals was reversed by the Supreme Court. While the ultimate decision of the latter Court appears to rest on other grounds, the majority opinion reiterates that "[i]t is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test." TEAMSTERS LOCAL v. LABOR BOARD, supra at page 675.

The relevance of motive as a determinative factor is discussed at length in the concurring opinion of Mr. Justice Harlan, with whom Mr. Justice Stewart concurred, 365 U.S. 667, 677-685. It is therein stated, at page 679:

> "What in my view is wrong with the Board's position in these cases is that A MERE SHOWING OF FORESEEABLE ENCOURAGEMENT OF UNION STATUS IS NOT A SUFFICIENT BASIS FOR A FINDING OF VIOLATION of the statute. It has long been recognized that an employer can make reasonable business decisions, UNMOTIVATED BY AN INTENT TO DISCOURAGE UNION MEMBERSHIP OR PROTECTED CONCERTED ACTIVITIES, although the foreseeable effect of these decisions may be to discourage what the act protects." (Emphasis by this Court.)

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[4] LOS ANGELES-SEATTLE MOTOR EXPRESS, INCORPORATED, et al., 121 NLRB 1629 (1958); see also MOUNTAIN PACIFIC CHAPTER, etc., 119 NLRB 883 (1957).

[5] LOCAL 357, INTERNATIONAL BROTHERHOOD, etc. v. NLRB, 275 F.2d 646 (D.C. Cir. 1960).

Mr. Justice Harlan went on to say, at page 680: "In general, this Court has assumed that a finding of a violation of § 8(a)(3) or § 8(b)(2) requires an affirmative showing of a MOTIVATION of encouraging or discouraging union status or activity."

We are of the opinion that RADIO OFFICERS v. LABOR BOARD, supra, lends support to our point of view.[4] We refer particularly to NLRB v. GAYNOR NEWS CO., 347 U. S. 17, 34. Therein the employer and the union were parties to an agreement under which the union was recognized as the exclusive bargaining agent for both union and non-union employees. Pursuant to the terms of a supplementary agreement, retroactive wage increases were granted to union employees but denied non-union employees; gratuitous vacation benefits were granted and denied on the same basis.

The matter came before the Board on a complaint which charged the employer and the union with a violation of Sections 8(a)(3) and (1). The only answer offered by the employer was that the retroactive wage payments and gratuitous benefits had been paid under the compulsion of a legally binding contract. The Board concluded, as did the Trial Examiner, that the contract afforded no defense to the charge. We agree with this conclusion. The Board held that the disparate treatment of the employees on the basis of union membership foreseeably encouraged union membership and was therefore a violation of the pertinent sections under which the employer and the union were charged.

The view of the Board was sustained by the Supreme Court, which held that the evidentiary facts, absent proof of a valid business reason, were sufficient to support an inference that the disparate treatment of the employees was intended to encourage union membership. The Court said,

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[4] Three cases were consolidated for hearing and disposition.

[5] GAYNOR NEWS CO. INC., et al., 93 NLRB 299 (1951).

at page 46: "No more striking example of discrimination so foreseeably causing employee response as to obviate the need for any other proof of intent is apparent than the payment of different wages to union employees doing a job than to non-union employees doing the same job."

The Court held, at page 47, "that in the circumstances of this case, the union being exclusive bargaining agent for both member and nonmember employees, the employer could not, without violating § 8(a)(3), discriminate in wages solely on the basis of such membership even though it had executed a contract with the union prescribing such action. Statements throughout the legislative history of the National Labor Relations Act emphasize that exclusive bargaining agents are powerless 'to make agreements more favorable to the majority than to the minority.' Such discriminatory contracts are illegal and provide no defense to an action under § 8(a)(3)."

The Supreme Court held: "that specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of § 8(a)(3)," but it did not disregard motivation as a relevant factor. The Court said:

> "The relevance of the motivation of the employer in such discrimination has been consistently recognized under both § 8(a)(3) and its predecessor. In the first case to reach the Court under the National Labor Relations Act, LABOR BOARD v. JONES & LAUGHLIN STEEL CORP., 301 U.S. 1, in which we upheld the constitutionality of § 8(3), we said with respect to limitations placed upon employer's right to discharge by that section that 'the [employer's] true purpose is the subject of investigation with full opportunity to show the facts.' Id., at 46. In another case the same day we

[6] We recognize, as did the Supreme Court in the cited case and in other cases, the right of the Board to draw an inference of unlawful motive in the absence of evidentiary facts to support an inference to the contrary.

found the employer's 'real motive' to be decisive and stated that 'the act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees.'" RADIO OFFICERS v. LABOR BOARD, supra, at page 43.

It was established by LABOR BOARD v. MACKAY, supra, that an employer, TO PROTECT AND CONTINUE HIS BUSINESS, may replace strikers during the strike and assure the replacements that their employment will not be terminated upon settlement of the strike. Such a replacement policy is obviously discriminatory and may tend to discourage union membership. The presence of these factors in and of themselves do not render the policy illegal. The test of its legality is the true purpose, or real motive, of the employer. This was clearly the test applied by the Court in the cited case. Ibid. The rationale of the MACKAY case is pertinent in the instant case.

We direct our attention to NLRB v. CALIFORNIA DATE GROW. ASS'N., 259 F.2d 587 (9th Cir. 1958), and OLIN MATHIESON CHEM. CORP. v. NLRB, 232 F.2d 159 (4th Cir. 1956). The question before the Court in these cases was the legality of a preferential seniority policy. It was found in each case that there was no evidence that the policy was adopted to protect and continue the business. The respective Courts decided that the policies were motivated by a desire to discourage union activities. It should be noted that both Courts applied the test of real motive. The decisions recognized that a preferential policy would be proper under appropriate circumstances.

We reject as unsupportable the rationale of the Board that a preferential seniority policy is illegal however motivated. We are of the opinion that inherent in the right of an employer to replace strikes during a strike is the concomitant right to adopt a preferential seniority policy which will assure the replacements some form of tenure.

provided the policy is adopted SOLELY to protect and continue the business of the employer. We find nothing in the Act which proscribes such a policy. Whether the policy adopted by the Company in the instant case was illegally motivated we do not decide. The question is one of fact for decision by the Board.

The additional question raised in the petition for review filed by the Union is rendered moot by our decision; we therefore see no reason to discuss it.

The cross-petition for enforcement will be denied.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 335

SWARCO, INC. (SWAN RUBBER COMPANY, DIVISION OF AMERACE CORPORATION), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The only question presented here is whether it is an unfair labor practice in violation of Section 8 (a) (3) and (1) of the National Labor Relations Act for an employer to discriminate between strikers and non-strikers by arbitrarily granting super seniority to employees who refrain from striking or abandon the strike, and by subsequently laying off, as junior employees, strikers who do not return to work until after the strike's termination.

This is the same question which is presented in *National Labor Relations Board* v. *Erie Resistor Corporation and International Union of Electrical, Radio and Machine Workers, Local 613, AFL-CIO*, pending on petition for writ of certiorari, No. 288, this Term. As the petition in that case sets forth, the question is of importance and there is a conflict of decisions among the circuits on the issue.[1] Accordingly, the Board does not oppose the grant of this petition.

Respectfully submitted.

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Solicitor General.

STUART ROTHMAN.
General Counsel.

DOMINICK L. MANOLI.
Associate General Counsel.

NORTON J. COME.
Assistant General Counsel.

MARION L. GRIFFIN.
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National Labor Relations Board.

SEPTEMBER 1962.

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[1] The decision of the Sixth Circuit in this case conflicts with the Third Circuit's decision in *International Union of Electrical, R. & M. Wkrs.* v. *National Labor Relations Board*, 303 F. 2d 359, and the Ninth Circuit's decision in *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. 2d 82.

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